No. 12-234

In the Supreme Court of the United States

KIMBERLY CRAVEN, PETITIONER

v.

ELOUISE PEPION COBELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's decision approving the settlement of the long-running *Cobell* Indian trust class action litigation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 679 F.3d 909. The opinion of the district court (Pet. App. 31a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2012. The petition for a writ of certiorari was filed on August 20, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In the late 19th century, Congress directed the division of Indian tribal lands, some of which were allotted to individual Indians. See Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887); *Babbitt* v. *Youpee*, 519 U.S. 234, 237 (1997). Allotted lands were either owned

by individual Indians, subject to restrictions on alienation, or were held in trust by the United States. *Youpee*, 519 U.S. at 237.

Over the years, as interest in the land passed to multiple heirs, ownership of the allotments became increasingly "fractionated." *Youpee*, 519 U.S. at 237. Although Congress ended further allotment of tribal lands in 1934, interests in lands previously allotted continued to splinter. *Id.* at 238. Multiple generations of inheritances yielded exponential growth in the number of individual interests per allotment. Beneficial ownership of the underlying lands is now shared among some four million interests, D. Ct. Doc. 1705, Ex. at II-1, and the United States Department of the Interior records individual ownership interests to the 42d decimal point, H.R. Rep. No. 499, 102d Cong., 2d Sess. 28 & n.94 (1992) (*1992 House Report*).

The United States may approve productive uses of allotted lands. See, *e.g.*, 25 U.S.C. 396 (authorizing the lease of allotted lands for mining purposes, subject to approval by the Secretary of the Interior). When the United States approves transactions in allotted lands that produce revenue, it typically places the proceeds into individual accounts, held for those with an interest in the land, known as Individual Indian Money Accounts (IIM accounts). *Cobell* v. *Norton*, 428 F.3d 1070, 1071-1072 (D.C. Cir. 2005) (*Cobell XVII*); see 25 U.S.C. 162a(a) (authorizing the Secretary of the Interior to establish accounts for funds held in trust for the benefit of individual Indians). The Department of the Interior estimated that as of December 31, 2000, it had deposited approximately $13 billion into IIM accounts since 1887 and has distributed $12.6 billion from them, leaving a balance of $416.2 million. *Cobell XVII*, 428 F.3d at 1072.

b. In 1992, Congress issued a report, entitled "Misplaced Trust," that was highly critical of the Interior Department's management of IIM accounts. See *1992 House Report*. Among other concerns, the report criticized the efforts of the Interior Department's Bureau of Indian Affairs (BIA) "to provide a full and accurate accounting of the individual * * * account funds." *Id.* at 2. Considering the BIA's then-existing "reconciliation project" for IIM (and tribal) accounts, the report expressed "concern[]" with "the enormity of [the] cost estimates [($281 million to $390 million)] to complete the IIM reconciliations." *Id.* at 25 & n.81, 26. The report observed: "Obviously, it makes little sense to spend so much when there was only $440 million deposited in the IIM trust fund for account holders as of September 30, 1991." *Id.* at 26.

In 1994, Congress enacted legislation addressing the Interior Department's management of the IIM accounts. American Indian Trust Fund Management Reform Act of 1994 (the 1994 Act), Pub. L. No. 103-412, 108 Stat. 4239 (25 U.S.C. 162a(d) and 4001 *et seq.*). That statute provides that the Secretary of the Interior's proper discharge of the United States' trust responsibilities includes "[p]roviding periodic, timely reconciliations to assure the accuracy of accounts." 25 U.S.C. 162a(d)(3). It specifically requires the Secretary to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian," 25 U.S.C. 4011(a); to provide to the account holder a quarterly "statement of performance," 25 U.S.C. 4011(b); and to conduct an "annual audit" of all funds held in trust for the benefit of an individual Indian, 25 U.S.C. 4011(c). The 1994 Act did not specify the

manner in which the Interior Department was to fulfill those obligations.

2. a. Eloise Cobell and three other named plaintiffs (the class representatives) brought this class action suit in 1996 on behalf of present and former IIM account holders. They sought, among other things, to compel the Interior Department to conduct a "complete historical accounting of their trust accounts."[1] *Cobell* v. *Norton*, 240 F.3d 1081, 1102 (D.C. Cir. 2001) (*Cobell VI*). In 1997, the district court certified a class, under Federal Rule of Civil Procedure 23(b)(1)(A) and (b)(2), of all present and former IIM account beneficiaries. *Cobell* v. *Babbitt*, 30 F. Supp. 2d 24, 28 (D.D.C. 1998) (*Cobell I*). After a six-week trial, the court declared that the government had not fulfilled its duties. It held, *inter alia*, that the 1994 Act required a historical accounting of all money in the IIM trust accounts and that the accounting had been unreasonably delayed. *Cobell* v. *Babbitt*, 91 F. Supp. 2d 1, 29, 58 (D.D.C. 1999) (*Cobell V*). The court "retaine[d] continuing jurisdiction over this matter for a period of five years" to monitor the accounting. *Id.* at 59. In 2001, the court of appeals largely affirmed the district court's decision. *Cobell VI*, 240 F.3d at 1107.

b. In 2003, the district court held a trial to consider accounting plans proposed by the government and the class representatives. *Cobell* v. *Norton*, 283 F. Supp. 2d 66, 85, 147-211 (D.D.C.) (*Cobell X*). The Interior Department submitted a plan that would have cost an esti-

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[1] The complaint also appeared to seek compensatory relief. See, *e.g.*, *Cobell* v. *Babbitt*, 30 F. Supp. 2d 24, 40 n.16 (D.D.C. 1998) (complaint provision sought an order directing the government "to restore trust funds wrongfully lost, dissipated, or converted" (citation omitted)). However, plaintiffs disavowed any claim for "cash infusions into the IIM accounts." *Id.* at 40.

mated $335 million. Pet. App. 4a. After hearing forty-four days of testimony, *Cobell X*, 283 F. Supp. 2d at 85, the district court noted the difficulty in completing a full historical accounting given the effects of "fractionat[ion]" of ownership interests, *id.* at 169. The court also observed that there were "approximately 195,000 boxes or containers of Indian trust records" in multiple locations. *Id.* at 152. The court nevertheless found the Interior Department's accounting plan inadequate because, among other things, it would rely on statistical sampling methods. *Id.* at 187-198. The district court issued a "structural injunction," *id.* at 213, requiring the Interior Department to undertake a comprehensive effort to retrieve records and verify virtually every IIM account transaction since 1887, *Cobell* v. *Norton*, 392 F.3d 461, 465 (D.C. Cir. 2004) (*Cobell XIII*). The estimated cost of the district court's plan was $6-$12 billion. *Id.* at 466.

Congress swiftly reacted. Within a month of the district court's decision issuing the structural injunction, Congress authorized not more than $45 million to be used by the Interior Department in the upcoming fiscal year for specified trust management purposes. Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1263 (2003). Congress also provided that the 1994 Act should not "be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust" until December 31, 2004, or until Congress amended the 1994 Act "to delineate the specific historical accounting obligations of the Department of the Interior with respect to the Individual Indian Money Trust." *Ibid.*

The conference report accompanying the legislation explained that the accounting contemplated by the district court "would require that vast amounts of funds be diverted away from other high-priority programs, including Indian programs. That would be devastating to Indian country." H.R. Conf. Rep. No. 330, 108th Cong., 1st Sess. 117 (2003). The report also noted that the expensive accounting mandated by the district court "would not provide a single dollar to the plaintiffs" and stated that "Indian country would be better served by a settlement of this litigation." *Ibid.* In light of the legislation, the court of appeals vacated the structural injunction. *Cobell XIII*, 392 F.3d at 468.

After the appropriations act lapsed on January 1, 2005, the district court reissued the same structural injunction. *Cobell* v. *Norton*, 357 F. Supp. 2d 298 (D.D.C. 2005) (*Cobell XIV*). The court of appeals again vacated the order, explaining that the 1994 Act "doesn't support the inherently implausible inference that [Congress] intended to order the best imaginable accounting without regard to cost." *Cobell XVII*, 428 F.3d at 1075. Although the court of appeals declined to specify the precise parameters of the government's accounting obligation, it held that the Interior Department could use statistical sampling for at least some transactions. *Id.* at 1077-1078.

c. The litigation remained pending with no resolution through 2009. By that time, the court of appeals had twice reversed district court orders requiring disconnection of the Interior Department's computer systems from the Internet. *Cobell* v. *Norton*, 391 F.3d 251, 253-254 (D.C. Cir. 2004) (*Cobell XII*); *Cobell* v. *Kempthorne*, 455 F.3d 301, 302 (D.C. Cir. 2006) (*Cobell XVIII*), cert. denied, 549 U.S. 1317 (2007). The court of appeals had

also either directed removal of certain subsidiary judicial officers appointed by the district court to supervise the accounting process or had suppressed reports prepared by such an officer who the district court should have recused. *Cobell* v. *Norton*, 334 F.3d 1128, 1140-1145 (D.C. Cir. 2003) (*Cobell VIII*); *In re Kempthorne*, 449 F.3d 1265, 1269-1272 (D.C. Cir. 2006); *In re Brooks*, 383 F.3d 1036, 1044-1046 (D.C. Cir. 2004), cert. denied, 543 U.S. 1150 (2005). The court of appeals eventually ordered the case assigned to a new district court judge. *Cobell XVIII*, 455 F.3d at 331-335. In doing so, the court of appeals "close[d] with a warning to the parties," noting that five years after the first appellate decision in the litigation, "no remedy [was] in sight," and urging the parties to "work with the new judge to resolve this case expeditiously and fairly." *Id.* at 335-336.

In October 2007, following the assignment to a new judge, the district court held a ten-day trial to assess the Interior Department's progress in satisfying its obligations under the 1994 Act. The district court found "substantial improvements in the administration of the trust." *Cobell* v. *Kempthorne*, 532 F. Supp. 2d 37, 86 (D.D.C. 2008) (*Cobell XX*). But the district court found continuing challenges in establishing a feasible means of conducting a historical accounting. Among other things, "[o]riginal cost and time estimates were off by several multiples," and Congress had not appropriated the funds needed. *Id.* at 58; see *e.g., ibid.* (2003 plan, originally estimated to cost $335 million to implement, later estimated to cost approximately $1.675 billion). The district court concluded on that basis that a "real accounting" was "impossible." *Id.* at 102. That was not "because of missing records." *Id.* at 103 n.21. Rather, the court found determinative "the tension between the ex-

pense of an adequate accounting" and Congress's unwillingness to provide funds for such an accounting. *Ibid.*

In June 2008, the district court conducted another ten-day trial to consider plaintiffs' claim for equitable "restitution" in light of the district court's determination that the Interior Department was unable to complete what it regarded as an adequate accounting. *Cobell* v. *Kempthorne*, 569 F. Supp. 2d 223, 225 (D.D.C. 2008) (*Cobell XXI*). Based on an unproven but statistically possible difference between aggregate receipts and disbursements since the IIM accounts were first created in 1887, the district court awarded the class a lump sum of $455.6 million. *Id.* at 225-227, 236-239, 252.

The court of appeals again vacated the district court's order. *Cobell* v. *Salazar*, 573 F.3d 808, 809 (D.C. Cir. 2009) (*Cobell XXII*), cert. dismissed, 130 S. Ct. 3497 (2010). The court of appeals rejected the district court's conclusion that it was impossible for the Interior Department to fulfill its statutory obligation to conduct an accounting. *Id.* at 812-813. The Department's obligation, the court explained, is to carry out "the best accounting that Interior can provide, with the resources it receives, or expects to receive, from Congress." *Id.* at 811. While the "proper scope of the accounting ultimately remains a question for the district court," the court of appeals again emphasized that the Interior Department could employ statistical sampling to verify transactions. *Id.* at 813; see *id.* at 815 ("We must not allow the theoretically perfect to render impossible the achievable good.").

3. a. Given the ongoing uncertainty about the scope of a historical accounting, "and the likelihood of many more years of litigation," Pet. App. 5a, in December 2009, the parties reached a settlement of the suit, con-

tingent on congressional legislation, *id.* at 5a-8a, 137a. The settlement, by providing for the future purchase and consolidation of fractionated land interests, sought to address the central underlying problem that led to many of the difficulties the Interior Department experienced in managing IIM accounts. *Id.* at 170a; see *id.* at 519a (Claims Resolution Act of 2010 (Claims Resolution Act), Pub. L. No. 111-291, § 101(e)(1)(C), 124 Stat. 3067) (appropriating $1.9 billion for that purpose). The settlement committed an additional $1.5 billion to be used to pay the claims of two overlapping plaintiff classes. *Id.* at 125a (providing for $1.412 billion); *id.* at 517a, 524a-526a (Claims Resolution Act, § 101(a)(9) and (j), 124 Stat. 3066, 3069) (adding additional $100 million); see *id.* at 138a (providing for the filing of an amended complaint identifying the two plaintiff classes).

The "Historical Accounting Class" consists of individuals "who had an IIM Account open during any period between October 25, 1994 and the Record Date [set by the parties' agreement, September 30, 2009], which IIM Account had at least one cash transaction credited to it." Pet. App. 6a, 131a. In lieu of receiving a historical accounting, each of the estimated 360,000 members of the class, Gov't C.A. App. 119 (Tr. 176), instead is to receive a $1000 payment, Pet. App. 7a, 156a. Because the Historical Accounting Class was to be certified under Federal Rule of Civil Procedure 23(b)(1)(A) and (b)(2), absent class members would not be permitted to opt out of the settlement. Pet. App. 144a.

The "Trust Administration Class" consists of individuals who held IIM accounts at any time between 1985 and the date of the proposed amended complaint, as well as individual Indians who, as of the Record Date, had an ownership interest in restricted or trust land. Pet. App.

6a, 136a. All members of the Historical Accounting Class also are, necessarily, members of the Trust Administration Class. Unlike the Historical Accounting Class, however, members of the Trust Administration Class could opt out of the settlement of their claims. *Id.* at 144a. Those who did not opt out would receive a base payment of at least $800, plus a *pro rata* share of the class funds based upon "the average of the ten (10) highest revenue generating years in each individual Indian's IIM Account." *Id.* at 160a; see *id.* at 7a, 158a-162a; see also *id.* at 9a (noting that congressional appropriation increased minimum payment to Trust Administration Class from $500 to approximately $800).

The settlement provides for a release of certain claims. Pet. App. 7a. While all historical accounting claims are released, *id.* at 181a-182a, claims for payment of account balances in existing accounts, claims for any breaches committed after the Record Date, and claims for future trust reform are not released, *id.* at 183a-184a. In addition, class members who do not opt out of the Trust Administration Class waive the right to challenge the accuracy of the balance of their IIM accounts, as reported in the last periodic statement of 2009. *Id.* at 186a. Persons opting out of the Trust Administration Class remain free to pursue individual damages claims concerning management of funds and approvals of uses of trust lands. *Id.* at 185a-186a.

The settlement agreement also contains provisions for attorneys' fees and incentive payments for class representatives, requiring plaintiffs to provide notice of the amounts being sought prior to filing in the district court a motion for preliminary approval of the settlement. Pet. App. 187a, 189a. The agreement recites that the district court, in its discretion, would determine the

amounts to be paid. *Id.* at 188a, 190a. In a separate agreement, class counsel agreed not to request attorneys' fees, expenses, and costs of more than $99.9 million, and the government agreed not to contest a request for payment of not more than $50 million. D. Ct. Doc. No. 3664-1, ¶ 4(a) and (b). The parties further agreed that neither side would appeal the district court's award of attorneys' fees, expenses, and costs provided that the amount was within those limits. *Id.* ¶ 4(e).

b. In December 2010, the President signed into law the Claims Resolution Act. In the Act, Congress "authorized, ratified, and confirmed" the agreed-upon settlement of this suit. Pet. App. 517a (Claims Resolution Act, § 101(c)(1), 124 Stat. 3066). The Act appropriated the funds necessary to implement the settlement. *Id.* at 519a, 524a (Claims Resolution Act, § 101(e) and (j), 124 Stat. 3067, 3069). The Act amended the district court's jurisdiction to permit the court to enter against the United States a money judgment of the magnitude contemplated by the settlement, including $1.9 billion for the establishment of a land consolidation fund and $1.5 billion for payments to class members. *Id.* at 518a (Claims Resolution Act, § 101(d), 124 Stat. 3066); see 28 U.S.C. 1346(a)(2) (Supp. IV 2010) (providing for district court jurisdiction over claims against the United States "not exceeding $10,000"). The Act further authorized the district court to certify the Trust Administration Class "[n]otwithstanding the requirements of the Federal Rules of Civil Procedure," and provided that the class shall thereafter "be treated as a class certified under Rule 23(b)(3)." Pet. App. 518a (Claims Resolution Act, § 101(d)(2), 124 Stat. 3067). Congress also directed the exclusion from federal income taxation of all settle-

ment payments to class members. *Id.* at 521a-522a (Claims Resolution Act, § 101(f), 124 Stat. 3068).

4. a. In December 2010, the district court provisionally certified the Historical Accounting and Trust Administration Classes, granted preliminary approval of the parties' settlement, ordered an expansive program of class notice, and invited objections to the settlement. Pet. App. 9a, 33a, 38a. Out of hundreds of thousands of class members, there were 92 objections, and 1824 individuals opted out of the Trust Administration Class. *Id.* at 9a, 39a; Gov't C.A. App. 134 (Tr. 237). In June of the next year, the district court held a fairness hearing, considering arguments from the parties' counsel and from objectors. Pet. App. 34a. The court rendered an oral ruling at the hearing, explaining that the settlement was in all respects fair, adequate, and reasonable. *Id.* at 9a-10a. A month later, the district court issued a written order approving the settlement. *Id.* at 31a.

The four class representatives asked the district court to award them incentive awards of $2 million, $200,000, $150,000, and $150,000, respectively. Pet. App. 96a-105a. They also requested payment of asserted expenses of $10.5 million. *Id.* at 105a-110a. The district court awarded the requested incentive awards, finding them "fair and reasonable." *Id.* at 41a. But it denied the class representatives' request for expenses, concluding that the class representatives had not established that the asserted costs were their own. *Id.* at 42a. Despite having agreed not to request attorneys' fees, costs, and expenses in excess of $99.9 million, class counsel asked the district court to award them a fee of $223 million and approximately $1.3 million in expenses and costs. *Id.* at 83a. The district court, however, awarded

class counsel a total of $99 million, finding that amount "fair and reasonable." *Id.* at 42a.

b. Petitioner is an IIM account holder who did not opt out of the Trust Administration Class but who did file a timely objection. Pet. App. 9a. After the district court approved the settlement and entered final judgment, petitioner appealed the district court's order approving the settlement. The court of appeals affirmed. *Id.* at 1a-28a.

In the court of appeals, petitioner argued that the district court erred in certifying the Historical Accounting Class as a mandatory class under Federal Rule of Civil Procedure 23(b)(2). Pet. App. 13a. In support, petitioner relied (*id.* at 14a) on this Court's decision in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), which held that Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages," *id.* at 2557.

The court of appeals rejected that argument as based on a "mischaracteriz[ation of] the Historical Accounting Class," which asserted claims for an accounting, not for money damages. Pet. App. 13a; see *id.* at 14a; see also *id.* at 27a (explaining that payment was for plaintiffs' "surrender [of the] right to an historical accounting"). Even assuming, as petitioner contended, that the $1000 per capita settlement payment "monetizes" the class's injunctive claims, the court of appeals concluded that there was no basis for petitioner's contention that class members were differently situated, with "some plaintiffs stand[ing] to gain more from claims based on the information an historical accounting would produce." *Id.* at 14a. That was because "the record developed through extensive and hard-fought litigation indicates that the

different interests she alleges likely do not exist." *Id.* at 15a; see *ibid.* ("Interior had performed a fairly extensive accounting in the course of the litigation but found only minor discrepancies."). In addition, the court gave "significant weight" to "Congress's judgment that uniform payments would adequately compensate class members for an accounting right that it created." *Id.* at 16a.

The court of appeals likewise rejected petitioners' contention that certification of the Trust Administration Class was unfair because some members "likely possess more valuable claims than do others and therefore the *per capita* baseline payment undercompensates the former while over-compensating the latter." Pet. App. 17a. The court concluded that "the existence of the opt-out alternative effectively negates any inference that those who did not exercise that option considered the settlement unfair." *Id.* at 20a; see *ibid.* (noting district court finding of "extensive and extraordinary notice" (citation omitted)). In addition, the court observed that "[t]he historical-accounting records examined thus far have revealed only minor errors in trust accounting," minimizing the likelihood that class members had claims of significantly different value. *Ibid.* & n.9 (citing 2007 Interior Department report); see *id.* at 27a ("Class counsel acknowledged that, despite significant work with existing data, efforts had failed to show significant accounting errors in the IIM accounts.").

The court of appeals also rejected petitioner's contention that the "incentive payments" the district court awarded to the class representatives created an impermissible conflict between the representatives and the absent class members. Pet. App. 25a-26a. In holding that those awards did not undermine the fairness of the settlement, the court of appeals explained that "the class

settlement agreement provided no guarantee that the class representatives would receive [any] incentive payments" at all. *Id.* at 25a. Rather, the agreement "left that decision and the amount of any such payments to the discretion of the district court." *Ibid.* In addition, the government's opposition to the amount of the award sought by the class representatives "highlighted the uncertain status of such payments at the time of the settlement." *Ibid.* Moreover, in elaborating the significant efforts of plaintiff Eloise Cobell that justified the largest incentive payment, the district court found no basis for the contention that Cobell had "settle[d] prematurely in order to collect a fee." *Id.* at 26a.

ARGUMENT

The court of appeals correctly affirmed the district court's approval of the congressionally sanctioned settlement of this long-running litigation. The court's decision does not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. When it enacted the 1994 Act, Congress provided for the Secretary to account for the daily and annual balance of funds held in trust for an Indian tribe or individual Indian. 25 U.S.C. 4011(a). But Congress did not define the scope of that obligation. The class representatives brought suit, arguing that the 1994 Act required a detailed, historical accounting of every IIM account. *Cobell* v. *Norton*, 240 F.3d 1081, 1102 (D.C. Cir. 2001). After years of litigation, it became clear that the individualized accounting sought by plaintiffs was prohibitively expensive, far exceeding amounts that Congress was willing to appropriate. *Cobell* v. *Norton*, 392 F.3d 461, 466 (D.C. Cir. 2004); *Cobell* v. *Kempthorne*, 532 F. Supp. 2d 37, 58 (D.D.C. 2008); accord Pet. 5.

Against that backdrop, the parties negotiated a settlement of the litigation, Pet. App. 117a-246a, under which all eligible individuals would give up their claim for a historical accounting in return for a $1000 monetary payment, *id.* at 156a. Additionally, eligible individuals could choose to receive further compensation to remedy possible past errors in management of IIM accounts or approvals of the use of trust lands, based in part on individualized determinations. *Id.* at 158a-162a; see *id.* at 9a. The settlement also addressed the fundamental problem underlying the IIM accounts by providing for the unprecedented purchase and consolidation of fractionated land interests. *Id.* at 170a-174a.

Because the settlement required the expenditure of substantial public funds and a limited waiver of sovereign immunity, it had to be endorsed by Congress, which agreed that the parties' proposal to resolve the litigation over the scope of the 1994 Act with respect to accounting was appropriate. Congress accordingly "authorized, ratified, and confirmed" the agreed-upon settlement. Pet. App. 517a (Claims Resolution Act, § 101(c)(1), 124 Stat. 3066). Congress also appropriated nearly $3.5 billion to fund the land consolidation and the payments to class members under the settlement. *Id.* at 519a, 524a (Claims Resolution Act, § 101(e)(1)(C) and (j)(1)(A), 124 Stat. 3067, 3069).

After conducting a hearing and entertaining objections, the district court approved the settlement agreement, finding that it was fair, adequate, and reasonable. Pet. App. 31a-46a. The court of appeals, in turn, concluded that the district court's judgment reflected no legal error and no abuse of discretion, and should be upheld. *Id.* at 1a-28a. The lower courts' decisions are correct: The settlement is generous in relation to the

strength of plaintiffs' case and given the likelihood of years of further litigation absent an agreement. *Id.* at 5a, 9a-10a, 27a-28a. The settlement also allowed members of the Trust Administration Class to opt out if they so chose, *id.* at 20a, 144a-145a, and is overwhelmingly in the interest of the class members, see *id.* at 27a-28a.

The settlement of this litigation, authorized and ratified by an Act of Congress, embodies a welcome and wholly legitimate means of resolving what had become, after years of litigation, an essentially intractable problem.

2. Petitioner identifies no sound reason for the Court to grant certiorari. Petitioner contends that the Court should grant review to explain when adequate representation of absent class members becomes impossible, either as a result of conflicts among class members (Pet. 11-22), or because of incentive payments to class representatives (Pet. 22-31). But the court of appeals correctly resolved those issues. In any event, this suit does not present an appropriate vehicle to address the first issue, and the second is a fact-based determination not worthy of further review.

a. Federal Rule of Civil Procedure 23(a)(4) states that a court may certify a class only if "the representative parties will fairly and adequately protect the interests of the class." One aspect of that adequate representation requirement is that the class not contain individuals with significantly conflicting interests. See, *e.g.*, *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 626 (1997) (adequate representation requirement not satisfied when "interests of those within the single class are not aligned"); see also *Ortiz* v. *Fiberboard Corp.*, 527 U.S. 815, 864 (1999) (limited fund class action may be

settled only if "intraclass conflicts [are] addressed by recognizing independently represented subclasses").

Petitioner argues that the settlement here did not satisfy that requirement because the class contains "structural conflict[s]." Pet. 13. According to petitioner, some class members have claims that are "potentially of a very high value, but not known at this time," while other class members have only "low-value claims." *Ibid.* Petitioner suggests that while class members with low-value claims have little interest in a full accounting, "the need for a proper accounting was of critical importance to those Indians who held high-value claims." Pet. 12.

Petitioner's argument misunderstands the nature and function of the Historical Accounting and Trust Administration Classes. The settlement provides for a uniform payment of $1000 to each member of the Historical Accounting Class. Pet. App. 6a-7a. That per capita payment is consideration for the release of the class members' claim seeking to compel the Interior Department to prepare and distribute to each class member a historical statement of each class member's IIM account. *Ibid.* It is not a damages payment for individualized harm, nor does the payment resolve any claims of actual mismanagement; the separate and additional payments to the Trust Administration Class serve those purposes. See *id.* at 15a; Gov't C.A. App. 133 (Tr. 231-232).

Moreover, although the court of appeals had held that the 1994 Act required a historical accounting, this Court had never addressed that issue in the long-running litigation, and it remained open for the government to challenge that proposition—or the scope of any such historical accounting—in this Court. See Br. in Opp., *Cobell* v. *Salazar* (No. 09-758) at 17-18 & n.4, cert. dismissed, 130 S. Ct. 3497 (2010). In any event, as the court of appeals

explained, "[b]y the time the parties entered settlement negotiations," "it had become clear that the Secretary would be unable to perform an accounting of the IIM trust under the 1994 Act with the degree of accuracy desired by the plaintiff class." Pet. App. 22a. That is because Congress had made it abundantly clear that it was unwilling to fund the accounting demanded by the plaintiff class. Pet. App. 27a; see *id.* at 22a ("Preliminary work had revealed that even a partially complete accounting would be prohibitive in cost.").

Congress instead determined that the per capita payment to the Historical Accounting Class was an appropriate resolution of the plaintiff class's claims under the 1994 Act. Pet. App. 517a (Claims Resolution Act, § 101(c)(1), 124 Stat. 3066) (settlement agreement is "authorized, ratified, and confirmed"). Congress could have chosen to repeal entirely any obligation of the Interior Department to conduct a historical accounting. See *United States* v. *Jicarilla Apache Nation*, 131 S. Ct. 2313, 2329 n.9 (2011) (Congress generally "retains the right to alter the terms of [Indian] trust[s] by statute, even in derogation of tribal property interests."). Such a repeal would have mooted this suit for injunctive and declaratory relief to require a historical accounting, and resulted in no relief at all to class members. See, *e.g.*, *Salazar v. Buono*, 130 S. Ct. 1803, 1817-1818 (2010). Congress's ratification of the per capita payment to members of the Historical Accounting Class thus "carries significant weight and sets this case apart from others," as the court of appeals concluded. Pet. App. 16a.

Petitioner similarly misunderstands the role of the Trust Administration Class.[2] Under the settlement,

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[2] Because Congress authorized the certification of the Trust Administration Class "[n]otwithstanding the requirements of the Fed-

every member of that class who did not opt out will receive a baseline amount of approximately $800. Pet. App. 9a. That amount will then be adjusted upwards based on an individualized determination of the highest ten years of receipts in each class member's IIM account, from 1985 to 2009, and paid on a *pro rata* basis from the $1.5 billion lump-sum appropriated by Congress. *Id.* at 160a-162a. Individual compensation for members of the Trust Administration Class is expected to range from a low of $800 to a high, for some individuals, of tens or hundreds of thousands of dollars, or even over $1 million. See Gov't C.A. App. 130 (Tr. 220-221). And payment to members of the Trust Administration Class will be made without the need for a demonstration by plaintiffs of any actual errors in management by the Interior Department. Pet. App. 160a-162a.

Petitioner speculates that, because "tribes (and the individuals within them) put their land to different uses, including ranching, exploiting natural resources, grazing, and harvesting timber, among myriad other uses," Pet. 11-12, "it makes sense that different trust claims would be worth different amounts, and that some would

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eral Rules of Civil Procedure," Pet. App. 518a (Claims Resolution Act, § 101(d)(2)(A), 124 Stat. 3067), the only limitations on the certification of that class are those imposed by due process. *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010) (Congress "can create exceptions to an individual rule [of civil procedure] as it sees fit—either by directly amending the rule or by enacting a separate statute overriding it in certain instances."). Petitioner argues that certification of the Trust Administration Class violated due process, because either alleged intra-class conflicts (Pet. 11-22), or incentive payments to the named class representatives (Pet. 22-31) rendered inadequate the representation of the absent class members. Those arguments lack merit for the reasons provided in the text.

well exceed the far more limited award all class members would receive," Pet. 12. But the settlement agreement accounts for differences in the productive use of allotted lands by providing for *pro rata* payments based on individualized determinations—a feature of the settlement petitioner ignores. See *ibid.*

In addition, the Interior Department's review of millions of IIM transactions occurring between 1985 and 2007 "revealed only minor errors in trust accounting," Pet. App. 20a, leading the district court to observe that "one permissible conclusion from the record would be that the government has not withheld any funds from plaintiffs' accounts," *id.* at 21a (quoting *Cobell* v. *Kempthorne*, 569 F. Supp. 2d 223, 238 (D.D.C. 2008)). Petitioner thus errs in contending that the district court certified the Trust Administration Class without any "evidence of any *lack* of conflict," Pet. 14, or that the court of appeals, in affirming the district court's order, ignored the court's obligation to ensure that the interests of absent class members are adequately represented and, instead, improperly shifted the burden of persuasion to objectors, Pet. 17-21.

Significantly, moreover, members of the Trust Administration Class could opt out of the settlement. Pet. App. 144a-145a. Thus, those who desired to reserve their rights and pursue mismanagement claims on their own had an ample and meaningful opportunity to exclude themselves from the settlement. Petitioner asserts that the right of Trust Administration Class members to opt out was "functionally meaningless," Pet. 20, because they could not similarly "opt out of the Historical Accounting Class that forfeited their right to an accounting," thus leaving class members without any information about "what their particular claims against

the federal government would be worth," Pet. 19. But petitioner herself concedes that "it became clear that providing an adequate accounting to each class member was prohibitively expensive." Pet. 5. And petitioner is mistaken in suggesting that class members had no information about the accuracy of trust records on which to base their opt-out decision, in light of the evidence of minimal discrepancies in IIM transactions. See Pet. App. 20a-21a.

In light of the individualized determination afforded to members of the Trust Administration Class; the evidence of, at most, "small variances" in the analyzed transactions, Pet. App. 21a; and the right of Trust Administration Class members to opt out of the settlement and pursue their own trust mismanagement claims, the court of appeals properly concluded that the district court committed no error in finding no divergent interests among class members, *id.* at 23a. In the absence of any identified intra-class conflict, this suit does not present a proper vehicle for considering when a divergence of interests makes representation of a class inadequate. No further review is warranted.[3]

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[3] Petitioner asserts a circuit conflict on whether an inherent, structural conflict can disqualify a class or whether, instead, "hard evidence" of an actual conflict is required. Pet. 16 (citation omitted). For the reasons provided in the text, the asserted circuit conflict is immaterial. In any event, no such conflict exists. Contrary to petitioner's suggestion (*ibid.*), the Fourth and Ninth Circuits have recognized that structural considerations can render a class inadequate. See, *e.g.*, *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462-463 (9th Cir. 2000) (recognizing that a "potential conflict of interest between members of the class" can render the class representation inadequate but concluding that "in this case any conflict is illusory"); *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998) ("[I]t takes no special scrutiny of the putative class to discern

b. Petitioner also contends that the class representatives in this case created a disqualifying conflict of interest by requesting $13 million in incentive payments (Pet. 26-28) and that the court of appeals' decision creates a circuit split on the question of when incentive payments create a conflict of interest between the class representatives and the absent class members (Pet. 23-26). Those arguments lack merit.

As the Ninth Circuit has explained, "[i]ncentive awards are fairly typical in class action cases." *Rodriguez* v. *West Publ'g Corp.*, 563 F.3d 948, 958 (2009) (emphasis omitted). Incentive payments "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Id.* at 958-959. Petitioner implies that, while courts of appeals have approved incentive payments, the Sixth, the Seventh, and the Ninth Circuits have placed an absolute limit on the ratio of those payments to payment to absent class members. Pet. 24-25. She contends that the court of appeals here created a circuit split by approving an incentive payment "many

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the manifest conflicts of interest within it."). Nor is petitioner correct in suggesting (Pet. 15-16) that the District of Columbia Circuit rejected that principle in this suit. In context, the court of appeals' rejection of the "hypothetical conflict," Pet. App. 19a, that petitioner asserted amounts to no more than a determination that, in light of the similar interests of class members and the record evidence indicating an absence of significant errors in the Interior Department's trust accounting, the conflict petitioner asserts was too speculative to defeat the district court's class certification, see *id.* at 19a-23a; see also Pet. 16 (acknowledging that "[m]ost courts have held that conflicts within a class must be more than just 'speculative'").

thousands of times greater than the class recovery." Pet. 25.

Petitioner has failed to identify any real disagreement. In evaluating the propriety of a district court's award of incentive payments, the courts of appeals do not employ any mathematical formula. Rather, they look to ensure that the district court carefully considered whether the particular incentive payment would create a conflict of interest between the class representatives and the absent class members and whether the district court made an individualized determination concerning the propriety of any incentive payment made. See, *e.g.*, *Espenscheid* v. *DirectStat USA, LLC*, 688 F.3d 872, 876 (7th Cir. 2012) (noting that "an incentive award so large in relation to the judgment or settlement that if awarded * * * would significantly diminish the amount of damages received by the class" would create "a clear conflict of interest"); *Staton* v. *Boeing Co.*, 327 F.3d 938, 976-977 (9th Cir. 2003) (holding that incentive payments that were "orders of magnitude" greater than the typical would be permissible, provided that the district court evaluated class representatives' awards "individually"); *Hadix* v. *Johnson*, 322 F.3d 895, 897 (6th Cir.) ("[A]pplications for incentive awards are scrutinized carefully by courts who sensibly fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain."), cert. denied, 540 U.S. 854 (2003).

In this case, before the district court certified the Historical Accounting and Trust Administration Classes, the class representatives disclosed their intent to seek incentive payments ranging between $150,000 and $2 million and additional expenses of $10.5 million. Pet. App. 189a, 86a-112a. That gave the district court the

opportunity to consider whether the class representatives' incentive-payment request created any conflict of interest with the class members. Cf. *Rodriguez*, 563 F.3d at 959 (affirming district court's denial of incentive payments where class representatives failed to disclose prior to class certification their incentive-payment agreement with class counsel).[4] The district court then made an individualized determination concerning the propriety of each incentive payment, concluding that the payments were merited and did not create any conflicting incentives. Gov't C.A. App. 135-136 (Tr. 238-243); see *id.* at 135 (Tr. 239) (finding that incentive payment to Cobell could not plausibly be seen as giving her an incentive to "compromise easily"); *id.* at 136 (Tr. 243) (denying request for $10.5 million in expenses because class representatives did not establish that they paid those expenses).

The court of appeals affirmed the district court's award of incentive payments, holding that the district court properly determined that the payments did not give the class representatives an interest to settle on terms less favorable to the absent class members. Pet.

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[4] In *Rodriguez*, the Ninth Circuit further held that an incentive-payment agreement that increased payments, up to a specified limit, to class representatives depending on the amount of recovery created an inherent conflict between the class representatives and the absent class members because the agreement eliminated the class representatives' incentive to seek recovery beyond that which would give them a maximum payment. See 563 F.3d at 957-960. The incentive payments sought by the class representatives and awarded by the district court in this case were absolute and so did not create the conflict of interest identified by the Ninth Circuit. Pet. App. 41a, 96a-105a.

App. 25a-26a. That fact-based ruling does not warrant further review.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2012

[5] Petitioner improperly conflates the question of attorneys' fees with the question of incentive payments to the class representatives. Pet. 31; see Pet. 6. As petitioner notes, at the close of the litigation, class counsel sought attorneys' fees in the amount of $223 million. Pet. 31. The government opposed that request as too high, and the district court ultimately issued an award of $99 million. Pet. App. 11a n.5; *id.* at 42a. Petitioner did not challenge the attorney fee award in the court of appeals, and its propriety is not before this Court.